

Senate, April 7, 1998. The Committee on Judiciary reported through SEN. WILLIAMS, 29th DIST., Chairman of the Committee on the part of the Senate, that the substitute bill ought to pass.

AN ACT CONCERNING INTER VIVOS TRUSTS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. Section 45a-151 of the general
2 statutes is repealed and the following is
3 substituted in lieu thereof:

4 (a) Upon application by executors, guardians,
5 conservators, administrators [, trustees in
6 insolvency] and trustees appointed, or whose
7 appointment has been approved, by the Court of
8 Probate, the court may, after [public notice] SUCH
9 NOTICE AS THE COURT SHALL DIRECT and hearing,
10 authorize such fiduciaries to compromise and
11 settle any doubtful or disputed claims or actions,
12 or any appeal from probate in favor of or against
13 the estates or persons represented by them.

14 (b) In order to accomplish such compromise or
15 settlement, the COURT MAY AUTHORIZE PAYMENT OF ANY
16 FUNDS RECEIVED OR TO BE RECEIVED, AFTER DEDUCTION
17 OF ATTORNEY'S FEES OR COSTS, DIRECTLY TO THE
18 FIDUCIARY ON BEHALF OF THE PROTECTED PERSON, OR TO
19 A NEWLY CREATED OR EXISTING TRUST FOR THE BENEFIT
20 OF THOSE REPRESENTED BY THE FIDUCIARY. SUCH TRUSTS
21 MAY INCLUDE THOSE CREATED IN COMPLIANCE WITH
22 SECTION 1917(d)(4) OF THE SOCIAL SECURITY ACT, 42
23 USC 1396p(d)(4), AS FROM TIME TO TIME AMENDED. IN

24 THE CASE OF A GIFT OR TRANSFER IN TRUST, ANY
25 TRANSFER TO A COURT-APPROVED TRUST CREATED BY A
26 FIDUCIARY SHALL BE SUBJECT TO CONTINUING PROBATE
27 COURT JURISDICTION AS IF IT WERE A TESTAMENTARY
28 TRUST. IN EVALUATING THE PROPOSED SETTLEMENT, THE
29 COURT SHALL CONSIDER THE BEST INTERESTS OF THOSE
30 REPRESENTED BY THE FIDUCIARY. THE court may ALSO
31 authorize the conveyance, with or without
32 requiring a bond, of the whole or any part of, or
33 any easement or other interest in, any real
34 property situated in this state forming part of
35 the trust estate or owned by any such trustee,
36 executor or administrator or owned by any deceased
37 person, ward or incapable person for whom such an
38 executor, guardian, conservator or administrator
39 was appointed.

40 Sec. 2. Subsection (e) of section 45a-655 of
41 the general statutes is repealed and the following
42 is substituted in lieu thereof:

43 (e) Upon application of a conservator of the
44 estate, after hearing with notice to the
45 Commissioner of Administrative Services and to all
46 parties who may have an interest as determined by
47 the court, the court may authorize the conservator
48 [to pay and distribute gifts of income and
49 principal from the estate of the ward in such
50 amounts or in such form as the court approves, to
51 individuals and qualified charities as defined in]
52 TO MAKE GIFTS OR OTHER TRANSFERS OF INCOME AND
53 PRINCIPAL FROM THE ESTATE OF THE WARD IN SUCH
54 AMOUNTS AND IN SUCH FORM, OUTRIGHT OR IN TRUST,
55 WHETHER TO AN EXISTING TRUST OR A COURT-APPROVED
56 TRUST CREATED BY THE CONSERVATOR, AS THE COURT
57 ORDERS TO OR FOR THE BENEFIT OF INDIVIDUALS,
58 INCLUDING THE WARD, AND TO OR FOR THE BENEFIT OF
59 CHARITIES, TRUSTS OR OTHER INSTITUTIONS DESCRIBED
60 IN SECTIONS 2055(a) AND 2522(a) OF the Internal
61 Revenue Code of 1986, or any corresponding
62 internal revenue code of the United States, as
63 from time to time amended. Such gifts OR TRANSFERS
64 shall be authorized only if the court finds that:
65 (1) In the case of individuals not related to the
66 ward by blood or marriage, the ward [has] HAD made
67 a previous gift to that individual prior to being
68 declared incapable; (2) in the case of a charity,
69 EITHER (A) the ward had made a previous gift to
70 such charity, [or] HAD pledged a gift in writing
71 to such charity, OR HAD OTHERWISE DEMONSTRATED

72 SUPPORT FOR SUCH CHARITY prior to being declared
73 incapable; OR (B) THE COURT DETERMINES THAT THE
74 GIFT TO THE CHARITY IS IN THE BEST INTERESTS OF
75 THE WARD, IS CONSISTENT WITH PROPER ESTATE
76 PLANNING, AND THERE IS NO REASONABLE OBJECTION BY
77 A PARTY HAVING AN INTEREST IN THE WARD'S ESTATE AS
78 DETERMINED BY THE COURT; (3) the estate of the
79 ward AND ANY PROPOSED TRUST OF WHICH THE WARD IS A
80 BENEFICIARY is more than sufficient to carry out
81 the duties of the conservator as set forth in
82 subsections (a) and (b) of this section, both for
83 the present and foreseeable future, including due
84 provision for the continuing proper care, comfort
85 and maintenance of such ward in accordance with
86 such ward's established standard of living and for
87 the support of persons the ward is legally
88 obligated to support; (4) the purpose of the gifts
89 is not to diminish the estate of the ward so as to
90 qualify the ward for federal or state aid or
91 benefits; and (5) in the case of a ward capable of
92 making an informed decision, the ward has no
93 objection to such gift. The court shall give
94 consideration to the following: (A) The medical
95 condition of the ward, including the prospect of
96 restoration to capacity; (B) the size of the
97 ward's estate; (C) the provisions which, in the
98 judgment of the court, such ward would have made
99 if he or she had been capable, for minimization of
100 income and estate taxes consistent with proper
101 estate planning; AND (D) IN THE CASE OF A TRUST,
102 WHETHER THE TRUST SHOULD BE REVOCABLE OR
103 IRREVOCABLE, EXISTING OR CREATED BY THE
104 CONSERVATOR AND COURT APPROVED. THE COURT SHOULD
105 ALSO CONSIDER THE PROVISIONS OF AN EXISTING ESTATE
106 PLAN, IF ANY. IN THE CASE OF A GIFT OR TRANSFER IN
107 TRUST, ANY TRANSFER TO A COURT-APPROVED TRUST
108 CREATED BY THE CONSERVATOR SHALL BE SUBJECT TO
109 CONTINUING PROBATE COURT JURISDICTION IN THE SAME
110 MANNER AS A TESTAMENTARY TRUST. NOTWITHSTANDING
111 ANY OTHER PROVISION OF THIS SECTION, THE COURT MAY
112 AUTHORIZE THE CREATION AND FUNDING OF A TRUST THAT
113 COMPLIES WITH SECTION 1917(d)(4) OF THE SOCIAL
114 SECURITY ACT, 42 USC 1396p(d)(4), AS FROM TIME TO
115 TIME AMENDED. The provisions of this [section]
116 SUBSECTION shall not be construed to validate or
117 invalidate any gifts made by a conservator of the
118 estate prior to October 1, [1983] 1998.

119 JUD COMMITTEE VOTE: YEA 33 NAY 4 JFS

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"THE FOLLOWING FISCAL IMPACT STATEMENT AND BILL ANALYSIS ARE PREPARED FOR THE BENEFIT OF MEMBERS OF THE GENERAL ASSEMBLY, SOLELY FOR PURPOSES OF INFORMATION, SUMMARIZATION AND EXPLANATION AND DO NOT REPRESENT THE INTENT OF THE GENERAL ASSEMBLY OR EITHER HOUSE THEREOF FOR ANY PURPOSE."

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FISCAL IMPACT STATEMENT - BILL NUMBER sSB 520

STATE IMPACT	Indeterminate, see explanation below
MUNICIPAL IMPACT	None
STATE AGENCY(S)	Probate Courts (Judicial Department), Department of Social Services

EXPLANATION OF ESTIMATES:

STATE IMPACT: Inter vivos trusts are a legal entity created by individuals and administered by a trustee for the benefit of the beneficiaries. Inter vivos trusts are created during an individual's lifetime and can be used to control assets and remove them from access by others having a claim on those assets.

In 1993, as part of the federal Omnibus Reconciliation Act (OBRA-93), Congress enacted language that exempted certain assets, when placed in a trust, from being used prior to becoming eligible for Medicaid payments (42 USC Section 139d(p)(4)(a)). This exemption applies to disabled individuals under the age of 65 where a trust has been established for the benefit of the individual by a parent, grandparent, legal guardian or court. The state must receive all the amounts remaining in the trust upon the death of the individual equal to the total Medicaid payments made on behalf of the person.

Current practice has allowed these trusts to be established since 1993. The Department of Social Services Policy Manual allowed an exemption for trusts established under the terms of OBRA-93. Current Medicaid expenditures are calculated based upon the

fact that these trusts have been established over the past five years, thus continuing the practice would not have an impact on current Medicaid expenditure estimates. However, eliminating the practice of allowing these trusts to protect assets that cannot be counted toward a Medicaid client's eligibility or benefit payment would represent a significant future cost savings to the state, assuming that such assets would exist in the absence of a law that allows them to be established.

If allowing these trusts to exist creates assets as a result of providing an incentive for an individual to pursue personal injury lawsuits that result in the payment of civil damages, then there would be a significant future savings to the state through the placement of a lien against the trust. The state would receive the remaining assets from the trust upon the death of the disabled individual. The extent of any future savings or future costs are dependent upon the number of such trusts created and the amount of funds placed into inter vivo trusts, which is indeterminate at this time.

Based on OBRA-93, the probate courts have provided oversight for the establishment of a small number of these trusts over the last few years. It was not until the recent case of State of Connecticut vs. Estate of James A. Saunders, which held that the probate court did not have jurisdiction over these trusts, that the authority of the probate court was challenged. Regardless of any result on appeal, passage of bill specifies that the probate court will continue to have jurisdiction over these types of trusts, with no additional fiscal impact to the court.

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OLR BILL ANALYSIS

sSB 520

AN ACT CONCERNING INTER VIVOS TRUSTS

SUMMARY: The bill specifies that probate courts, in connection with applications by fiduciaries to compromise or settle any claim, action, or probate

appeal may authorize payment of any funds received or to be received, after costs and attorney's fees are deducted, either directly to the fiduciary for the benefit for the ward, or to a newly created or existing trust for the benefit of those the fiduciary represents. The bill specifies that these trusts may include the types specified for disabled people under the federal Social Security Act. The bill eliminates the requirement that probate courts give public notice before holding a hearing on such applications. Instead, it requires the courts to give whatever notice they direct. And it requires probate courts, when evaluating proposed settlements, to consider the best interests of those the fiduciary represents.

The bill gives probate courts continuing jurisdiction over any transfers into a newly created court-approved trust created by a fiduciary to the same extent as if it were a testamentary trust. Essentially, this requires an accounting to probate court at least every three years.

The bill broadens the circumstances under which probate courts may authorize a conservator of an estate to make gifts from the estate to charities. It also gives probate courts the same continuing jurisdiction in the case of a gift or transfer to a court-approved trust created by the conservator as they currently have over testamentary trusts. The bill specifies that probate courts upon a conservator's application, may authorize the creation and funding of trusts for disabled people specified in the federal Social Security Act.

Finally, the bill specifies that it should not be interpreted to validate or invalidate any gifts made by a conservator of an estate prior to October 1, 1998.

EFFECTIVE DATE: October 1, 1998

FURTHER EXPLANATION

Gifts and Transfers from Ward's Estate

Under current law, probate courts may allow conservators of the estate to pay and distribute gifts of income and principal from a ward's estate to individuals or charities qualified under the Internal Revenue Code in whatever amount and form the courts

approve. The bill instead allows probate courts to authorize such conservators to make gifts or other transfers of income or principal, in whatever amount or form they order, to or for the benefit of individuals, including the ward, and for the benefit of charities, trusts or other institutions specified in the appropriate sections of the Internal Revenue Code. It also permits the court to authorize the establishment of a trust for disabled persons as specified in the federal Social Security Act.

Under current law, probate courts may only authorize gifts or payments to charities to which the ward had made a gift or pledged in writing to make a gift prior to being declared incapable. The bill adds charities to which the ward had otherwise demonstrated support prior to being declared incapable, and any charities if the court determines the gift is the ward's best interest, and consistent with proper estate planning, and that there is no reasonable objection by a party having an interest in the ward's estate.

Current law allows a court to authorize a charitable gift from a ward's estate only if the estate is more than sufficient to carry out the conservator's duties both for the present and the foreseeable future. Instead, the bill allows it only if the ward's estate and any proposed trust of which the ward is a beneficiary is sufficient.

Current law requires probate courts to consider certain issues or factors when deciding whether to allow gifts to a ward's estate. The bill requires them also to consider the provisions of an existing estate plan, if any, and in the case of gifts to a trust, whether the trust should be revocable or irrevocable, and whether it is existing or created by the conservator and court-approved.

BACKGROUND

Trusts Specified in the Social Security Act

Trusts to disabled people specified in the Social Security Act include:

1. trusts containing assets of a person under age 65 who is disabled and which is established to

benefit him by his parents, grandparent, or legal guardian, or by a court if the state will receive all amounts remaining in the trust when the person dies up to an amount equal to the total medical assistance (Medicaid) paid on behalf of that person under a state medical assistance plan as authorized by the Social Security Act; and

2. trusts containing the assets of a disabled person that (a) is established and managed by a nonprofit association; (b) maintain a separate account for each trust beneficiary but pools the accounts for investment and management purposes; (c) has accounts established solely for the benefit of disabled people by their parent, grandparent, or legal guardian, or by the court; and (d) upon the beneficiary's death pay to the state, from any remaining amounts in the account, an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the state plan.

Probate Jurisdiction Over Trusts

By law, trustees of testamentary trusts (those created by will) must render periodic accounts under oath to the probate court at least once during every three years or more frequently if required by the trust or will. Upon receipt of the periodic account, the court must give notice of its availability for examination to interested parties. Any such party may apply to the court for a hearing. Each periodic account must show fully how the principal is invested and the items of income and expenditure (CGS Sec. 45a-177). By contrast, the probate court has jurisdiction over an inter vivos trust (created by a person in his life time) only when one of the parties petitions the court for an accounting (CGS Sec. 45a-175).

Related Case

Recently, a Superior Court judge held that probate courts do not have the specific power and authority to approve and create an inter vivos trust upon the application of the conservator of the estate of an incapable person receiving Medicare assistance to

provide for the ward's special needs (State of Connecticut vs. Estate of James A. Saunders, No. CV95 32 09 99 S, Judicial District of Danbury).

COMMITTEE ACTION

Judiciary Committee

Joint Favorable Substitute
Yea 33 Nay 4